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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, Administratrix of the Estate of
Otis O. Couch, Deceased,
Petitioner,

VERSUS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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November, 1971

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In response to the Petition for Writ of Certiorari filed by petitioner and received by respondent on October 12, 1971, respondent respectfully submits:

STATEMENT OF CASE

Otis O. Couch had worked for respondent since at least 1954, with the exception of three years. (R. 268, 291-292) During this time, he had been a Section Laborer, Extra Gang Foreman, Machine Operator, Section Foreman and Assistant Roadmaster. (R. 290) Mr. Couch requested re-employment in December, 1960, and was assigned as Assistant Roadmaster on respondent's St. Louis Division. (R. 291) Mr. Couch assumed duties as Assistant Road-

master on respondent's Hominy to Oklahoma City territory in December, 1962. (R. 273) His duties for respondent at that time included traveling by motor car over this territory to discover defects in tracks, roadbed and crossings. As part of such duties, he could replace bolts, angle bars, loose spikes, tighten nuts, shovel ballast, and cut brush, if necessary. In his position, he determined whether a section crew would be needed, and if so, reported deficiencies to that crew or led and supervised the crew himself. (R. 135-136, 294)

In 1954, respondent had "about twenty-eight" Section Foremen and laborers for maintenance of track between Hominy, Oklahoma, and Oklahoma City, Oklahoma. (R. 179) Beginning in 1955, a program of reduction was instituted by respondent. Concurrent therewith, respondent initiated the acquisition and use of mechanical equipment. (R. 133-134, 295-296) On August 5, 1963, the area of track was maintained by four Section Foremen and ten section laborers. (R. 295-296) A Roadmaster and an Assistant Roadmaster patroled the stretch of secondary main line track. (R. 295) Mr. Couch had no one with him on the date of his death. Another railroad operating in Oklahoma had track supervisors who inspected the track and roadbed, usually taking a man with them. (R. 255-256)

On August 5, 1963, Mr. Couch had lunched with respondent's station agent in Cushing, Oklahoma. He returned to his duties at 12:45 o'clock p.m. on that date, giving no indication of physical incapacity. (R. 323, 324)

A man was seen cutting trees on defendant's track at a point approximately one and one-half miles Southwest of

Cushing, Oklahoma, at approximately 1:15 o'clock p.m. on that date. (R. 146-147) The body of Mr. Couch was discovered at that point at approximately 7:00 o'clock p.m. (R. 138) The records of the Weather Bureau for the reporting station nearest Cushing, Oklahoma, on August 5, 1963, reveal the temperatures ranged from 93 degrees to 99 degrees Farenheit between 1:00 o'clock p.m. and 6:05 o'clock p.m.; the wind velocity to have been from 7 mph to 17 mph during the same period; and, the relative humidity was from 37 per cent to 49 per cent during such period. (Plaintiff's Exhibit No. 7, R. 110, 456)

An autopsy was performed at approximately 9:30 o'clock p.m. the same evening. (R. 185) The examining physician's opinion as to the cause of Mr. Couch's death was acute heart failure. The causative factor being heat principally, together with conditions of exertion on the part of Mr. Couch. (R. 189, 200)

RESPONSE TO "QUESTIONS PRESENTED"
(Petitioner's Brief, Page 2)

Petitioner has set forth three separate questions which, to respondent, present one question. That question is whether the Supreme Court of the State of Oklahoma erroneously applied the standard of proof necessary to support a common law negligence action.

RESPONSE TO "REASONS FOR GRANTING THE WRIT"
(Petitioner's Brief, Pages 6 and 7)

Unquestionably, this Court has, in the past, exercised supervision and stewardship over judgments and decrees rendered by Federal and State courts in actions filed under the Federal Employers' Liability Act. Petitioner, however, asserts this Court should grant certiorari because the Supreme Court of the State of Oklahoma ignored the case of *Southern Pacific Company* v. *Hendricks, Administratrix*, 85 Ariz. 373, 339 P.2d 731, *certiorari granted* 361 U.S. 899, 4 L.Ed.2d 155, 80 S.Ct. 210, *certiorari dismissed* 361 U.S. 941, 4 L.Ed.2d 362, 80 S.Ct. 385, "as well as other federal authorities."

Granting of certiorari by this Court can only mean that at least four members of the Court deemed the petition in that case to be of sufficient importance *as to the facts of that case* that the same should be considered on its merits by the full Court. No decision was rendered on the merits of that case because the same was later dismissed pursuant to Rule 60 of this Court. It is worthy to also note that the *Southern* decision was based upon the failure to furnish medical assistance once the employer was placed on notice of the need therefor.

RESPONSE TO PETITIONER'S HEADING "IN DECIDING THIS CASE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, THE STATE COURT HAS ERRONEOUSLY APPLIED THE STANDARD OF PROOF NECESSARY TO SUPPORT RECOVERY IN A COMMON LAW NEGLIGENCE ACTION."

(Petitioner's Brief, Page 7)

Respondent understands the standard of proof in actions of this nature to be "* * * whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 1 L.Ed.2d 280, 77 S.Ct. 443. Negligence of the employer is "* * * the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller, Executor* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 472. In the *Tiller* case, this Court gave further insight to the subject by stating:

> "A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to *conditions under his control* when they are not such as a reasonable man ought to maintain in the circumstances.'" (Emphasis supplied.)

A court need only determine if the evidence is devoid of probative facts from which a conclusion may be drawn that employer negligence played any part in its employee's

injury or death. *Rogers* v. *Missouri Pacific Railroad Co., supra.*

The Supreme Court of the State of Oklahoma followed the standards set forth by this Court as is revealed in the following quotation from its opinion:

> " 'On a challenge to the sufficiency of the evidence to support the verdict, the question presented on appeal is, admitting the truth of all the evidence of the plaintiff, together with such inferences and conclusions as may reasonably be drawn therefrom, eliminating all evidence of defendant in conflict with plaintiff's evidence, and all opposing inferences, whether there is any competent evidence tending to support the verdict against defendant.' "

Petitioner calls attention to the case of *Gulf, Colorado & Santa Fe Railway Company* v. *Waterhouse* (Tex. Civ. App.), 22[illegible] S.W.2d 654, stating the Supreme Court of the State of Oklahoma placed undue prominence on the decision of the Texas Court. A reading of the *Waterhouse* decision reveals the latter Court recognized and scrupulously followed the directions set forth in earlier decisions rendered by this Court. That the opinion did not stand on the Texas law of master and servant should be obvious.

Petitioner, however, utilizes, out of context, a statement of this Court from the opinion rendered in *Stone* v. *New York, Chicago & St. Louis Railroad Co.*, 344 U.S. 407, 97 L.Ed. 441, 73 S.Ct. 358, to demonstrate how the Texas Court failed to apply proper standards when appraising the proofs. A more complete utilization of this Court's opinion in *Stone* would be appropriate. At page 409 thereof, it is indicated the section crew had encountered

other stubborn ties in that stretch of track, that other methods of removal of such ties were available, that other men were then available and that petitioner therein had warned his foreman that he had been pulling as hard as he could. He was ordered to pull harder and injured his back in so doing. The risks of injury *on those facts* were obvious. Petitioner would seem to ask this Court, on the basis of one sentence in *Stone,* to hold this employer to a duty of anticipating the likelihood of an injury or death of an employee under any circumstance. This would naturally mean such employer is an insurer of its employees. This Court has specifically held "the Act does not make the employer an insurer." *Inman* v. *Baltimore & Ohio Railroad Co.,* 361 U.S. 138, 4 L.Ed.2d 198, 80 S.Ct. 242.

RESPONSE TO PETITIONER'S HEADING "THE COURT HAS SUB SILENTO APPLIED THE COMMON LAW DOCTRINE OF ASSUMPTION OF RISK TO DEFEAT RECOVERY ON BEHALF OF THE DECEASED EMPLOYEE."

(Petitioner's Brief, Page 10)

The Supreme Court of the State of Oklahoma clearly recognized the doctrine of assumption of risk had no applicability to this action. That Court plainly made no application of the doctrine to defeat recovery by petitioner. On the contrary, the Oklahoma Court recognized the question clearly. The following statement from its opinion demonstrates this:

> "In other words, the removal of 'assumption of risk' as a defense available to the railroad did not relieve the employee's survivors from establishing that the railroad breached some duty of ordinary care which resulted in whole or in part in the employee's death."

The statement of the Oklahoma Court relied on by petitioner to show that Court applied the doctrine of assumption of risk to defeat recovery by petitioner further demonstrates the point. The point in controversy being what the railroad could reasonably anticipate or foresee under the circumstances of this case. This is true in determining whether the employer is negligent and whether any such negligence proximately caused in whole or in part, the death of its employee. *Gallick* v. *Baltimore & Ohio Railroad Company,* 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659, and *Inman* v. *Baltimore & Ohio Railroad Co., supra.*

RESPONSE TO PETITIONER'S HEADING "THE COURT HAS FAILED TO CONSIDER ALL OF THE CIRCUMSTANTIAL EVIDENCE SUPPORTING THE EMPLOYEE'S CAUSE OF ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT."

(Petitioner's Brief, Page 11)

It is apparent the Supreme Court of the State of Oklahoma considered all the evidence which might be favorable to petitioner, be it circumstantial or otherwise. The Court's opinion refers to all such evidence. The real problem confronted by petitioner is that the Oklahoma Court has required her to establish proof of respondent's negligence together with proximate cause.

Petitioner assumes her decedent was "over-exerting" himself at or before his death on August 5, 1963. There is no evidence in the record to show such. Counsel for petitioner, by his own question, assumed over-exertion and seeks to rely thereon. (R. 193)

There is no evidence that as a result of the reduction in personnel, other employees or petitioner's decedent

were required to do any more work than before such reduction. There is no evidence that any remaining employees of respondent were required to or did "over-exert" themselves while employed for respondent. There is no evidence that respondent was aware of any condition possessed by Mr. Couch which would create the likelihood of harm to him. There is no evidence from which it may be reasonably inferred that the place and manner of Mr. Couch's work produced the likelihood of danger to Mr. Couch which could or should have been eliminated by respondent in the exercise of reasonable care. There is no evidence from which it may be reasonably inferred that the usual accompaniment by other employees would have been reasonably expected to prevent, or assist in preventing, injury to or death of Mr. Couch.

Respondent does not have control of the sun or the differences in temperatures, winds or humidity. These are conditions which may not be eliminated. The fact Mr. Couch was working in the sun is not sufficient to require respondent to reasonably anticipate some harm would come to him. If this were true, then this Court need not have proceeded beyond finding the petitioner in *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208, 11 L.Ed.2d 256, 84 S.Ct. 291, was working in temperatures from 10 degrees Farenheit to minus 5 degrees Farenheit. In *Dennis, supra,* this Court held negligence of the railroad was established by proof ". . . that the foreman, who had full control over petitioner's activities while on this job, did not take all necessary and reasonable precautions to prevent injury to petitioner *when put on notice of his* condition." (Emphasis supplied.) In the present action, the

deceased was in full control of his work and had the discretion to decide the manner and time for performance of the same. There is no evidence respondent had notice of any propensity of the deceased employee for heart attack or heat stroke. Whether a railroad may keep a reasonable check of climatological conditions over all its lines for a twenty-four hour period, and the methods by which it may do so, are subjects of far-reaching imagination, particularly on the evidence herein.

Likewise, the fact Mr. Couch was working alone and was not accompanied by another person gives no cause to reasonably anticipate harm would come to him. If this were true, then respondent would be an insurer for all possible risks of harm to its employees. Respondent would be required to have its clerical help cross traveled streets in pairs because four eyes are better than two. That another person with Mr. Couch would have prevented his death is not a reasonable inference from the facts of this case. There is no evidence in the record of any similar experiences on respondent's railroad although case law reveals heat strokes occur to men working in concert with others. *Southern Pacific Company* v. *Hendricks, supra,* and *Gulf, Colorado & Santa Fe Ry. Co.* v. *Waterhouse, supra.*

There is no evidence petitioner's decedent was performing any greater duties than usual or was required to do so. Nor is it reasonable to say that the exertion of Mr. Couch, had additional men been present, would have been such as to prevent injury to or death of Mr. Couch, unless one assumes he should not have been exerting himself in any event. The cause of death was said to be the heat coupled with exertion. The same physician also stated heat

stroke to be a result of the cessation of perspiration. Why this occurs no one knows. (R. 192) In the *Inman* case, there was evidence to the effect that a lot of cars had been seen to jump the gun at the crossing in question. Yet this Court found that on the facts of that case the risk of harm was too tenuous and was not reasonably foreseeable by the employer. The slender reed in *Inman, supra,* is totally absent in this case.

Petitioner has cited *Southern Pacific Company* v. *Hendricks, supra,* as reason for this Court to grant certiorari. That case was decided by the Supreme Court of Arizona on the principle that the employer therein failed to furnish medical help when placed on notice of the illness of the employee. It does not reach the fact situation of this cause. An employee incurring a heart attack while performing heavy labor on a hot August day has been denied recovery under the Federal Employers' Liability Act in absence of proof the employer was negligent. *Creamer* v. *Ogden Union Railway & Depot Co.* (S.C. Utah), 242 P.2d 575, *certiorari denied* 344 U.S. 912, 97 L.Ed. 703, 73 S.Ct. 333. The fact of death from heat stroke should not make respondent liable without proof of negligence contributing thereto.

Reasonable foreseeability of risk of harm is an essential ingredient of negligence in an action such as this. *Gallick* v. *Baltimore & Ohio Railroad Co., supra.* Additionally, any injury or death must be the natural and probable consequence of that negligence which should have reasonably been anticipated under the circumstances. *Brady* v. *Southern Railway Co.,* 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232. Petitioner's proof supports neither.

REASON FOR DENYING THE WRIT PRAYED FOR BY PETITIONER

Petitioner seeks, in effect, only a review of the evidence in this cause. The Supreme Court of the State of Oklahoma, in its opinion, clearly demonstrates utilization of the proper guidelines set forth by this Court. Petitioner has had a full and fair review of the facts in this cause. Upon such review, the Supreme Court of the State of Oklahoma properly concluded the proof did not justify a conclusion that respondent was negligent or that any act or omission of respondent contributed in any way to the death of petitioner's decedent. Under such circumstances, there is no special or important reason for granting a writ of certiorari as prayed. In essence, plaintiff seeks to have this Court reverse its many decisions requiring recovery under the FELA to be based on proof of some negligence on the part of the employer. Plaintiff seeks to have this Court permit recovery merely on proof of injury or death during the course of employment, and thereby to make the employer an absolute insurer. This Court should not depart from its long established decisions to the contrary.

CONCLUSION

The Supreme Court of the State of Oklahoma properly and fully reviewed the evidence in this case and unanimously determined the same failed to support a finding of respondent's negligence or causation. Having done so, there is no sufficient or important reason for this Court to grant the writ of certiorari prayed for.

It is respectfully urged that the writ prayed for by petitioner be denied.

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November, 1971